FILED
APR 15 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

474

JOELLEN FAY INGRAM,)
Appellee,) Filed April 15, 1977
vs.)
79
OTTO INGRAM, JR.,) 2-58124
Appellant.)

Appeal from Muscatine District Court - R. K. Stohr, Judge.

Appeal from modification of dissolution decree. - Affirmed in part, modified in part and remanded.

Patrick M. Ryan, of Eckhardt, Goedken, Hintermeister and Ryan, of Muscatine, for Appellee.

Jon R. Pearce, of Stanley, Lande, Coulter & Pearce, of Muscatine, for Appellant.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

SNELL, J. 475

This is an appeal from a modification of the provisions of a decree of dissolution of marriage. The marriage of petitioner, Joellen Fay Ingram, and Otto Ingram, Jr. was dissolved on October 20, 1972. The dissolution decree provided that custody of the parties' two children, Nicole, then age seven, and James Paul, then age seven months, be with petitioner, Joellen. The decree included a stipulation of settlement by the parties which provided for no alimony for Joellen and no child support. It further provided that Otto have the right to visit the children, that adoption of the children be prohibited without the prior written consent of Otto, and for a division of the property. Joellen was awarded the homestead property, household furniture, goods and equipment, and a vacant tract of real estate in Indiana. Otto received the 1970 Pontiac automobile and some savings bonds.

On August 24, 1974, Otto applied for a modification of decree asking that his visitation rights be specifically fixed as to dates and times. He asked that a visitation of the children be granted for two months each summer and one week during the Christmas holiday vacation or such other times as the court deemed just.

On September 13, 1974, Joellen applied for modification of the decree. She claimed a change of circumstances such that Otto should be required to contribute to the children's support. She also asked the court to rule that the stipulation failed for lack of consideration on Otto's part.

The trial court modified the original decree by providing that Otto pay child support in the amount of $15 per week per child, commencing with the original date of decree, but that he be allowed a credit in the amount of $6000 which the court computed to be 1/2 of the total property received by Joellen

in the settlement. The court provided that as of December 1, 1975, Otto must make payments of $10 per week, per child, with $5 per week per child being credited against the equity remaining in the original $6000 until the balance was exhausted. Thereafter, the child support would continue until the child reached the age of 18 years, became emancipated, self-supporting or died. The court further fixed visitation rights by providing that Otto have custody of Nicole during the summer months when she was not in school, but that he be excused from child support payments during that time. As for Paul, the court provided for two weeks custodial period in the summertime with Otto until Paul finished his primary year in school. Otto was also granted custody of the children for one week during the Christmas holidays every other year commencing with even-numbered years.

At the time of the dissolution, both parties were employed making about $150 per week. Since the dissolution, both parties have remarried.

Otto, after the dissolution, increased his earnings so that in the first eight and one half months of 1974 he earned $8000. Nine days before filing his application for modification, Otto quit his job in order to enroll in college, pursuing a degree in accounting. During his schooling, Otto has received $300 per month in veteran's benefits and has not been otherwise employed. Otto's present wife, Michelene, is employed and earns approximately $14,000 per year. She also receives child support payments from her previous marriage in the amount of $100 per month.

Following Joellen's marriage to Leo Rasmussen, she quit her job at Bandag in Muscatine where she earned $150 per week in order to take a job in her husband's business at Wilton, Iowa

where she earned $125 per week. Leo Rasmussen, in 1974 had a total income of $32,000 plus $2750 in capitol gains income.

The equity received by Joellen from the sale of the family home was $10,000 which she put into a certificate of deposit. Joellen explained that she had not requested child support payments at the time of the dissolution because Otto had always told her that whoever got custody of the children should be responsible for their support and he wouldn't pay any child support if he didn't have custody.

Otto has appealed the modification which ordered him to pay child support. Joellen has appealed the modification asserting that the stipulation is void as against public policy or void because of inadequate consideration. She claims the change in circumstances should allow her child support in the amount of $20 per week per child instead of $15; that Otto should not have been allowed as a set-off against child support 50% of the equity in real estate, and that visitation rights to Otto should be denied because of his failure to pay child support.

Our review in this equity case is de novo. We give weight to the fact findings of the trial court but are not bound by them. Rule 344(f)(7), Rules of Civil Procedure.

The change of circumstance relied on by Otto is that Joellen refused to let him have visitation rights with Paul. The changed circumstance relied on by Joellen is that Otto's income increased substantially. Of course, that claim is somewhat muted by the fact that nine days before even Otto's application for modification, Otto's income ceased since he quit his job in order to return to college. In any event, the dispute over change of circumstances is moot. We find in this case the original stipulation regarding child support is

void as against public policy.

In Anthony v. Anthony, 204 N.W.2d 829 (Iowa 1973), the court voided an agreement made subsequent to the divorce decree wherein the husband agreed to give up his visitation rights in consideration of his not paying any more child support. The court stated:

> We find the agreement in this case void as contrary to public policy because it made the child's best interest subservient to parental self-interest." Anthony v. Anthony, *supra* at 834.

Otto seeks to inject the stipulation with vitality by pointing out that it was incorporated into the decree. If a provision is against public policy it is not made valid by being incorporated into a judicial decree. *See* Fitch v. Fitch, 207 Iowa 1193, 1197, 224 N.W. 503, 504 (1929).

Otto further points out that the stipulation was drawn by Joellen's lawyer, that he did not have his own lawyer, and that the stipulation granted Joellen most of the property as consideration. Authorship of the draft, of course, in no way affects its validity in this case, nor does the fact that Otto was unrepresented.

Concerning the argument of consideration, the equity received by Joellen amounted to approximately $10,000. Assuming that one half of this amount was Otto's, he bargained $5000 for release of his obligation to support his daughter for 11 years and his son for 17 years. Although divorced parents may contract between themselves as to support of a minor child, the agreement must be in the best interest of the child and must be founded on good and sufficient considerations. Denning v. Denning, 185 N.W.2d 238, 240 (Iowa 1971). We find the stipulation in this case is also void as not being founded upon sufficient consideration.

Otto was in school at the time of the modification decree and did not have substantial ability to pay at that time. The trial court's award of $15 per week per child instead of $20 was therefore appropriate. We hold that Otto shall be liable for child support in the amount of $15 per week per child commencing September 13, 1974 continuing at that rate until each child reaches 18, becomes emancipated, self-supporting or dies.

The trial court granted Otto a credit of $6000 against the child support owed under the modification. The $6000 was one half of an equity of $12,000 computed by giving Otto the benefit of the doubt as to its value. The record shows that the equity realized on the sale of the homestead by Joellen was $10,000. Additional property received by her was negligible.

Ordinarily, modification of the provision regarding division of property would have had to occur by an appeal from the original decree. A court is without power to modify a decree merely on the ground that it is inequitable. *See* Smith v. Smith, 257 Iowa 584, 133 N.W.2d 677, 681 (1965). Accordingly, Otto shall not receive credit against child support obligations for any amounts received by Joellen in the property settlement.

Regarding visitation, custody of Nicole by Otto is hereby modified to the extent that custody be during one summer month when she is not in school. "We cannot approve the award of custody to defendant during substantially a fourth of the calendar year." Smith v. Smith, *supra*. The trial court's provision regarding visitation is further modified to the extent that child support payments by Otto are not excused during the time he has visitation rights with either child. In re Marriage of Glass, 213 N.W.2d 668, 671 (Iowa 1973).

The case is affirmed in part, modified in part and remanded for an order in conformance with such modification.

All judges concur except Oxberger, J., who concurs specially.

Oxberger, J. (concurring specially)

I believe we should discuss the issue of whether Otto owes Joellen any child support for the period of time from the date of the agreement to the time Joellen asked for a modification. I would apply the law of estoppel by acquiescence discussed in Anthony v. Anthony, 204 N.W.2d 829, 834 (Iowa 1973). Joellen should be estopped from obtaining payments for this period. I interpret her brief as not asking for payments during this period.